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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BELINDA BICKELMANN, Individually and on Behalf of Others Similarly Situated, Plaintiff and Appellant, v. ASSIL SINSKEY EYE INSTITUTE, et al., Defendants and Respondents.	B200523 (Los Angeles County Super. Ct. No. BC321290)

APPEAL from orders of the Superior Court of Los Angeles County, Carolyn B. Kuhl, Judge. Affirmed.

Jamie R. Scholoss on behalf of Plaintiff and Appellant.

Ropers, Majeski, Kohn & Bentley, Susan H. Handelman and Terry Anastassiou on behalf of Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Belinda Bickelman (plaintiff) received by facsimile transmission an unsolicited announcement on her home business facsimile machine. In response, she filed a class action—on behalf of herself and all others who received the unsolicited facsimile announcement—against the drafters of the announcement, defendants and respondents Assil Sinskey Eye Institute (Eye Institute), Kerry K. Assil, M.D., Inc., and Kerry K. Assil (Dr. Assil). The complaint was based on, inter alia, an alleged violation of the Telephone Consumer Protection Act (the Act).[1]

During discovery, plaintiff identified the parties responsible for compiling the list of telephone numbers to which the announcement was transmitted and for transmitting the announcement—Interactive Communications, Ltd. (Interactive), Vision Lab Telecommunications, Inc. (VisionLab), and its chief executive officer, Pasquale Giordano—and added them as defendants. Plaintiff then obtained a discovery order that required VisionLab to produce, inter alia, records relating to the identities of the other persons or entities to whom the unsolicited announcement was transmitted. VisionLab, however, claimed the identifying information was no longer available. In a further effort to locate identifying information, plaintiff moved to compel compliance with a business records subpoena she served on nonparty Global Crossing Telecommunications, Inc. (Global Crossing), but the trial court denied that motion.

Although she was unable to obtain the identifying information about the class members that she sought in discovery, plaintiff filed a class certification motion seeking an order appointing her to represent a class of persons or entities who were sent the same unsolicited facsimile announcement that she had received. The trial court denied the motion on the grounds, inter alia, that the proposed class was not ascertainable and common issues did not predominate.

On appeal from the order denying her class certification motion, plaintiff raises a number of issues relating to the trial court's denial of her class certification motion and

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1 47 U.S.C. § 227 et seq.

her motion to compel compliance with the business records subpoena served on Global Crossing. We hold that (i) the trial court applied the correct legal criteria in determining whether the requisite community of interest existed; (ii) the trial court did not abuse its discretion in finding that common issues did not predominate; and (iii) even if the trial court erred in denying plaintiff's motion to compel compliance with the business records subpoena, any such error was harmless. We therefore affirm the orders denying plaintiff's class certification motion and the motion to compel compliance with the business records subpoena.

FACTUAL BACKGROUND

A. Plaintiff's Evidence[2]

In May 2004, plaintiff operated a small business from her home in Burbank, California. To conduct her business, plaintiff had dedicated telephone lines that linked to a computer and enabled her to receive facsimile transmissions. Although plaintiff never provided permission to anyone to send her facsimile advertisements, she received numerous "junk faxes" or unsolicited advertisements by telecommunication or facsimile transmission. Plaintiff "made extensive efforts to stop the faxing."

On May 21, 2004, plaintiff received at her home an unsolicited facsimile transmission from the Eye Institute announcing Dr. Assil's upcoming appearance on the Good Morning America television program (Good Morning America announcement). The facsimile began by inviting the recipient to "watch Dr. Kerry K. Assil perform a life changing Operation" on ABC's Good Morning America television program. The facsimile went on to state: "If you have been told you are not a good LASIK candidate, watch Dr. Kerry Assil perform the newest breakthrough technology to make the blind see. [¶] Good Morning America will be featuring Dr. Assil on national television

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2 The following facts are taken from the evidence submitted in support of plaintiff's motion for class certification.

Monday, May 24, 2004 on ABC at 7:00 a.m. Pacific Time. [¶] . . . [¶] Call toll free (866) 94-LASIK."

According to plaintiff, she did not consent to the transmission of the Good Morning America announcement from either Dr. Assil or the Eye Institute. And, plaintiff did not have a preexisting relationship with Dr. Assil, the Eye Institute, or any of the other defendants named in her civil action.

The Eye Institute paid $5,000 to VisionLab for a "facsimile blast" or distribution to Southern California. During the relevant time frame, VisionLab charged between $.035 and $.07 per facsimile. Based on the foregoing per facsimile price range, plaintiff calculated that VisionLab transmitted somewhere between 71,428 and 142,000 facsimiles of the Good Morning America announcement.

The vice president of the Eye Institute who supervised the May 21, 2004, "fax blast" of the Good Morning America announcement had located VisionLab by using a word search on "Google." When the vice president contacted VisionLab, he asked about the procedure for sending a "fax blast," and was informed that "you pay a certain amount of money, and [VisionLab] send[s] out a Fax Blast to a given region and that's it." The vice president informed VisionLab that the Eye Institute wanted to send the "fax blast" to persons in Los Angeles County.

VisionLab sent the "fax blast" in conjunction with Interactive. According to a VisionLab officer, VisionLab sent its customers to Interactive, but made no effort to ensure that the recipients of a "fax blast" consented to the transmission of the facsimile advertisements. After VisionLab referred a customer to Interactive, the customer would inform Interactive of the geographic area to which it wanted the facsimiles transmitted. Interactive would then send a list of facsimile telephone numbers in that area to VisionLab for use in the "fax blast." Upon receipt of the list, VisionLab would use it for a particular "fax blast." A VisionLab customer, such as the Eye Institute, would never see the list because it was transmitted directly from Interactive to VisionLab.

VisionLab had customers, such as the Eye Institute, sign a contract requiring the customer to comply with the Act. But VisionLab did not advise the customers about any

requirements of the Act. Instead, VisionLab's website made reference to the Act and then referred customers to a web page at Cornell Law School.

B. Eye Institute's Evidence[3]

The Eye Institute was originally founded in 1949 by Dr. Robert Sinskey. In 1995, Dr. Assil acquired Dr. Sinskey's practice and, in or about 2002 or 2003, the name of the practice was changed to Assil Sinskey Eye Institute. In 2005, the name of the practice was changed to the Assil Eye Institute.

At the time of the hearing on the class certification motion, the Eye Institute had locations in Santa Monica and Beverly Hills. The Eye Institute provided a broad range of treatments for eye disorders, including vision correction procedures such as laser "in-situ Keratomileusis (LASIK), photorefractive keratotomy (PRK), and astigmatic keratotomy (AK)." It employed three ophthalmologists, including Dr. Assil, five optometrists, and 40 to 45 medical assistants, administrators, clerical employees, and other staff employees.

The Eye Institute and Dr. Assil had been featured or mentioned in articles appearing in "the Wall Street Journal, USA Today, The Los Angeles Times, People, Time, Sports Illustrated," and other publications. In addition, Dr. Assil had "appeared on many local and a growing number of national television news programs to discuss various eye disorders, available treatments, and vision correction procedures." Dr. Assil had appeared in an estimated 50 such television news programs. He also performed eye surgery on television programs such as "The Today Show, Good Morning America, Inside Edition, and Extra."

During the relevant time frame, the Eye Institute advertised on radio, in the Los Angeles Times, and in the Daily News. In addition, the Eye Institute maintained a website that provided information about available treatments and invited the public to contact the Eye Institute by telephone, e-mail, or in person.

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3 The following facts are taken from the evidence submitted in support of the opposition to the class certification motion.

The Eye Institute also participated in a wide variety of events in the Los Angeles area, including golf tournaments, home shows, and five kilometer runs. At such events, the Eye Institute would set up booths, provide treatment information, and receive contact information from interested persons on cards provided for that purpose (contact cards). The Eye Institute participated in at least 50 such events in 2003 and 117 events in 2004. The Eye Institute estimated that approximately 17,500 people submitted contact cards at events in 2003 and 40,950 people submitted cards in 2004. Since 1995, the Eye Institute estimated that there were approximately 600,000 inquiries about care and treatment, 200,000 patient examinations, 50,000 consultations, and 30,000 surgical procedures.

In May 2004, the Good Morning America television program asked Dr. Assil to demonstrate a new lens replacement surgery—Verisyse—for its audience. Dr. Assil was participating in FDA testing for the Verisyse lens replacement procedure, believed it was potentially beneficial to the public, and decided to publicize his upcoming demonstration of the procedure on the Good Morning America program. The executive vice president of the Eye Institute and an assistant prepared an announcement of Dr. Assil's upcoming appearance. The vice president searched the internet and located a company called VisionLab, which purportedly specialized in fax communications and could transmit the Good Morning America announcement by facsimile transmission to portions of Los Angeles County. VisionLab charged the Eye Institute $5,000 to fax the notice. The facsimile transmission of the Good Morning America announcement was the first and last time the Eye Institute attempted to provide any general notice by means of facsimile transmission. The vice president of the Eye Institute was not aware that the Act placed restrictions on facsimile transmissions until after VisionLab transmitted the Good Morning America announcement in May 2004.

According to the Eye Institute, it was not responsible for the parties to whom the Good Morning America notice was sent. Rather, VisionLab acted as a broker with Interactive, which provided the list of recipients.

PROCEDURAL BACKGROUND

Plaintiff filed a class action in the trial court against the Eye Institute, Kerry K. Assil, M.D., Inc., and Dr. Assil based on, inter alia, alleged violations of the Act. Plaintiff defined the class as: "'All persons, businesses and entities in California who had no prior business relationship with defendants and who received unsolicited advertisements on their facsimile machines sent by, or on behalf of, defendants Sinskey, during the applicable faxing period in violation of the Telephone Consumer Protection Act.'" Plaintiff described the "faxing period" as "at least from on or about May 21, 2004, or in a temporal period near that time." Plaintiff asserted four causes of action for: violation of the Act; violation of Business and Professions Code section 17000, et seq.; negligence; and nuisance. As stated in the class definition, each cause of action was based upon either an express violation of the Act or "unlawful advertising" in violation of federal and California law. Plaintiff sought compensatory damages, statutory damages, punitive damages, injunctive relief, attorneys fees, and costs.

Almost a year after she filed her class action, plaintiff filed doe amendments naming Interactive, VisionLab, and VisionLab's CEO, Pasquale Giordano. VisionLab and Giordano answered the complaint,[4] and Interactive was eventually dismissed from the lawsuit.

After VisionLab appeared in the action, plaintiff filed an ex parte application for an "Order to Show Cause Why Sanctions Should Not Issue and for Order Compelling Compliance with Discovery Order as Modified and for Failure to Meet and Confer in Good Faith as Required in Discovery Matters." The application was directed at VisionLab only. VisionLab responded to the motion contending, inter alia, that the preexisting discovery order on which plaintiff based her application did not apply to VisionLab. In response to plaintiff's application, the trial court entered an amended discovery order that specifically applied to VisionLab. Among other things, the amended order required VisionLab to produce any records that identified the persons to whom the

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[4] Plaintiff ultimately filed a request for entry of default against VisionLab.

Good Morning America announcement was transmitted by facsimile. According to the VisionLab representative responsible for winding down VisionLab's affairs, however, he was unable to locate any such documents.

Plaintiff also served a form deposition subpoena for production of business records by nonparty Global Crossing, which allegedly was involved in the actual transmission of the announcement, and when Global Crossing failed to respond to the subpoena, she moved to compel compliance with it. The trial court denied that motion.

Pursuant to the trial court's order, plaintiff filed her motion for class certification. The motion defined the proposed class as follows: "All persons, businesses, or entities in California who received, sent by or through telephone facsimile machines, unsolicited facsimile advertisements advertising Defendant Assil Sinskey Eye Institute's or Kerry K. Assil's goods and services."

In January 2007, the trial court held a hearing on plaintiff's class certification motion. At the conclusion of the hearing, plaintiff requested further briefing, and the trial court ordered supplemental briefs.

On May 9, 2007, the trial court issued its "Opinion and Order on Plaintiff's Motion for Class Certification" that denied plaintiff's class certification motion. According to the trial court, "Plaintiff has evidence from which a jury could infer that a certain number of facsimiles were sent on behalf of the Assil Defendants. However, this evidence does not demonstrate the number of facsimiles that were received, and statutory penalties are imposed only for advertisements that were 'transmitted to' a person without permission. As in *Weaver* [*v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833], where common proof of the number of potential violations was available but individual proof was required to demonstrate an actual violation, here, the fact that a certain number of facsimiles were sent does not mean that each facsimile was received by a class member. Transmissions would not have been received if the telephone numbers were not current, if the receiving facsimile was not operative or was turned off, or if the receiving facsimile machine was out of paper. Thus, the fact that the Assil Defendants were charged for sending a certain number of advertisements does not mean that that number

of fax advertisements were received. [¶] With respect to proving whether each fax was 'unsolicited,' Plaintiff plans to offer proof that the Assil Defendants did not furnish the telephone numbers to which the advertisements were sent. Plaintiff would ask the finder of fact to infer that no person who received a fax advertisement had given express permission or invitation to receive such an advertisement, and no person had an established business relationship with the Assil Defendants. Although a finder of fact reasonably might be allowed to draw such an inference, the TCPA would allow the Assil Defendants to impeach Plaintiff's evidence by offering individual proof of relationships it had with any recipients of the facsimile. [¶] Again, the *Weaver* case presents an analogous situation. In *Weaver* the court held that individual facts were presented because the defendant lawfully could have precluded holders of identification stubs from purchasing tickets if they were under the influence of liquor or were 'of lewd or immoral character.' (*Weaver, supra*, 32 Cal.2d at 838.) No doubt few, if any, stub holders would have been disqualified from purchasing tickets on such bases. Nevertheless, the California Supreme Court found that such individual issues precluded certification when class members could not be individually identified. Similarly here, the Assil Defendants have no way of knowing how many members of the purported class gave permission to receive advertising or had an established business relationship with the Assil Defendants. If a class were certified, the Assil Defendants would be precluded from offering individualized proof to attempt to impeach Plaintiff's evidence as to the unsolicited nature of each fax advertisement. [¶] . . . [¶] This court concludes that a class action may not be certified. Class members cannot be individually identified, and the litigation requires determination of issues that turn on facts specific to particular individual members of the proposed class."

On May 25, 2007, plaintiff filed an application seeking leave to change the class definition and objecting to the trial court's order denying her class certification motion. The trial court denied the application, and plaintiff timely appealed from the order denying her class certification motion.

DISSCUSSION

A. Standards of Review

Plaintiff's challenge to the trial court's ruling on her class certification motion is governed by an abuse of discretion standard of review. "We review the trial court's ruling [on a class certification motion] for abuse of discretion. 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]" [citation]. . . . "Any valid pertinent reason stated will be sufficient to uphold the order."' (*Linder* [*v. Thrifty Oil Co.* (2000)] 23 Cal.4th [429,] 435–436; see also *Lockheed* [*Martin Corp. v. Superior Court* (2003)] 29 Cal.4th [1096,] 1106.)" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326-327 (*Sav-On*).)

"As the focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case (*Lockheed*, *supra*, 29 Cal.4th at pp. 1106–1107; *Linder*, *supra*, 23 Cal.4th at pp. 439–440), in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. (See *Lockheed*, *supra*, at p. 1108; *Anthony v. General Motors Corp.* (1973) 33 Cal.App.3d 699, 707 [109 Cal.Rptr. 254].) 'Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.' (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 478 [174 Cal.Rptr. 515, 629 P.2d 23]; see *Lockheed*, *supra*, at p. 1106.)" (*Sav-On, supra*, 34 Cal.4th at p. 327.)

Plaintiff's challenge to the trial court's ruling on her motion to compel compliance with the business records subpoena—which challenge is based on the contention that the trial court applied the wrong discovery statute—raises a question of law. Questions of

law are reviewed de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.) But, even if the reviewing court finds a challenged order legally erroneous, the appellant must further demonstrate prejudice caused by such error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

B. The Act

The theory of recovery advanced in each of plaintiff's causes of action is based upon an alleged violation of the Act. We therefore begin our analysis of the order denying class certification with a review of the pertinent requirements of that Act.

"Section 227(b) of the Act makes it unlawful 'to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.' (47 U.S.C. § 227(b)(1)(C).) 'Unsolicited advertisement' is defined as 'any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.' (*Id.*, § 227(a)(4); see also *id*., § 227(a)(2) [defining 'telephone facsimile machine'].)" (*Kaufman v. ACS Systems, Inc.* (2003) 110 Cal.App.4th 886, 894 (*Kaufman*).)

The Act "creates a conditional private right of action, stating: 'A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—[¶] (A) an action based on a violation of this [Act] or the regulations [promulgated by the FCC] to enjoin such violation, [¶] (B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or [¶] (C) both such actions.' (47 U.S.C. § 227(b)(3)(A)–(C).) The court may impose treble damages for willful or knowing violations. (*Id.*, § 227(b)(3).)" (*Kaufman, supra*, 110 Cal.App.4th at p. 896.)

"'Although actual monetary losses from telemarketing abuses are likely to be minimal, this private enforcement provision puts teeth into the statute by providing for statutory damages and by allowing consumers to bring actions on their own. Consumers who are harassed by telemarketing abuses can seek damages themselves, rather than

waiting for federal or state agencies to prosecute violations. Although . . . the statute does authorize states to bring actions on their citizens' behalf, the sheer number of calls made each day—more than 18,000,000—would make it impossible for government entities alone to completely or effectively supervise this activity.' (*Erienet, Inc. v. Velocity Net, Inc.* (3d Cir. 1998) 156 F.3d 513, 515.)" (*Kaufman, supra,* 110 Cal.App.4th at p. 898.)

The Act, however, "'does not act as a total ban on fax advertising.' (*Missouri ex rel. Nixon v. American Blast Fax, Inc.* [8th Cir. (2003)] 323 F.3d [649,] 659.) A fax broadcaster may send advertisements to those with whom it or the advertiser has an established business relationship. Fax broadcasters and advertisers may also obtain consent for their faxes through mailings, telephone calls made in accordance with telemarketing regulations, and interaction with customers at their places of business. (*Ibid*.; *Van Bergen v. State of Minn.* [8th Cir. (1995)] 59 F.3d [1541,] 1556; *Moser v. F.C.C.* (9th Cir. 1995) 46 F.3d 970, 975; 47 U.S.C. § 227; 47 C.F.R. § 64.1200 (2003); 15 U.S.C. §§ 6101–6108; 16 C.F.R. §§ 310.1–310.9 (2003).) 'Advertisers remain free to publicize their products through any legal means; they simply cannot do so through an *unsolicited* fax.' (*Missouri ex rel. Nixon v. American Blast Fax, Inc.*, *supra*, 323 F.3d at p. 659, italics added.)" (*Kaufman, supra,* 110 Cal.App.4th at p. 911.)

"The term 'established business relationship' means 'a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.' (47 C.F.R. § 64.1200(f)(4) (2003).)" (*Kaufman, supra,* 110 Cal.App.4th at p. 910.)

C. Validity of Order Denying Class Certification

Plaintiff challenges the trial court's order denying class certification, contending that the court applied improper legal criteria, relied on speculation and improper

evidence, and made unauthorized factual findings on the third affirmative defense. Focusing primarily on the defendants' failure to produce records showing the telephone numbers to which the Good Morning America announcement was transmitted, plaintiff contends that the trial court's order effectively rewarded defendants for discovery misconduct. Because we conclude that the trial court, in analyzing the community of interest standard, applied the proper legal criteria in denying the class certification motion, and did not otherwise abuse its discretion, we affirm the trial court's ruling denying class certification.

1. Standards Governing Class Certification

"'Section 382 of the Code of Civil Procedure authorizes class suits in California when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well-defined community of interest among the class members.' (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913 [103 Cal.Rptr.2d 320, 15 P.3d 1071] (*Washington Mutual*).)" (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1103-1104.)

"Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata. Common questions of law and fact are required in order to assure the interests of the litigants and the court are furthered by permitting the suit to proceed as a class action 'rather than in a multiplicity of separate suits.'" (*Hicks v. Kaufman & Broad Home Corp*. (2001) 89 Cal.App.4th 908, 914, fns. omitted.) "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440 [97 Cal.Rptr.2d 179, 2 P.3d 27] (*Linder*).)" (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at p. 1104.)

2. Community of Interest

Because both the ascertainability and community of interest standards must be satisfied before a trial court can certify a class, the trial court's denial of the class certification motion should be upheld if the evidence shows that plaintiff failed to satisfy *either* of those standards. Here, the evidence was sufficient to support the trial court's conclusion that the determination of common issues would not predominate over the issues that must be individually litigated.

"'The community of interest requirement [for class certification] embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [174 Cal.Rptr. 515, 629 P.2d 23].) [It is the plaintiff's] burden to establish the requisite community of interest and . . . 'the proponent of certification must show, inter alia, that questions of law or fact common to the class predominate over the questions affecting the individual members.' (*Washington Mutual, supra,* 24 Cal. 4th at p. 913.)" (*Lockheed Martin Corp. v. Superior Court, supra*, 29 Cal.4th at p. 1104.) The plaintiff's burden "is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*." (*Id*. at p. 1108.)

Each of plaintiff's four causes of action is predicated either upon express violations of the Act or "unlawful advertising," which presumably also refers to violations of the Act. As discussed above, to establish a violation of the Act, plaintiff must show that (i) each of the putative class members received the Good Morning America announcement; and (ii) the announcement was unsolicited, i.e., the putative class member either did not consent to the transmission of the announcement or had no established business relationship with the Eye Institute or Dr. Assil.

Accordingly, under the Act, plaintiff is required to show more than a record of a successful transmission of the Good Morning America announcement to a putative class member's facsimile number. She is also required to show *actual receipt* of the announcement by each putative class member, because even if the announcement was

successfully transmitted to a given telephone facsimile machine, the machine may have been out of paper, ink, or otherwise not functioning properly. Thus, before liability could be imposed for a violation of the Act as to any putative class member, that class member would be required to submit testimony or other evidence establishing actual receipt of the announcement, i.e., individual proof of liability.

In addition, to establish that the Good Morning America announcement was *unsolicited* as to a given putative class member, individual evidence on that issue would also be required. Plaintiff contends that the burden is on the drafter or sender of the advertisement, not the putative class member, to show an established business relationship. But even assuming that is correct, it does not change the individualized nature of the necessary proof because in determining whether common issues predominate, the trial court must consider the proof necessary, not just to the plaintiff's claims, but also to the defendant's affirmative defenses. (*Walsh v. IKON Office Solutions, Inc.* (2005) 148 Cal.App.4th 1440, 1450.) Therefore, to satisfy their burden on the consent and the established business relationship issues, the Eye Institute and Dr. Assil would be required to produce individual records showing the requisite consent from or business relationship with each putative class member. They would also be entitled to cross-examine individual putative class members concerning the issue. Moreover, once the Eye Institute submitted a record showing consent or a business relationship, the putative class member to whom the record pertained would have a right to submit individual evidence disputing the existence of any such consent or relationship. The necessity for such highly individualized proof on the consent and the established business relationship issues supports the trial court's conclusion that common issues did not predominate over those which must be tried on an individual basis.

In reaching this conclusion, we reject plaintiff's assertion that there was no substantial evidence supporting an inference that the Eye Institute or Dr. Assil had consent from or an existing business relationship with any of the putative class members. The opposition papers included substantial evidence showing that during the relevant time period, the Eye Institute advertised heavily in Los Angeles County, participated in

numerous sporting and charity events, received contact cards from thousands of interested persons, received over 600,000 inquiries from potential patients, and treated over 200,000 patients. That evidence supported a reasonable inference that many of the putative class members may have either had an established business relationship with the Eye Institute and Dr. Assil as patients, or had otherwise consented to the transmission of the announcement by, for example, submitting contact cards.

As for plaintiff's contention that the trial court summarily adjudicated the third affirmative defense,[5] we find no support for that claim in the record. The trial court did not make any findings on the merits of any claim or defense and, in particular, did not adjudicate whether the Eye Institute or Dr. Assil had an existing business relationship with any putative class member. Instead, applying the correct legal criteria applicable to the community of interest standard, the trial court concluded that the adjudication of the actual receipt and established business relationship issues would require individualized proof and that the necessity for such proof showed that common issues did not predominate. Because that conclusion is not arbitrary or capricious, the trial court did not abuse its discretion in denying the class certification motion. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159 ["The trial court's 'application of the law to the facts is reversible only if arbitrary and capricious'"].)

D. Business Records Subpoena

Plaintiff contends that the trial court erred when it denied her motion to compel compliance with the business records subpoena served on Global Crossing, and that such error prevented her from obtaining identifying information about the class members that was necessary for her class certification motion. According to plaintiff, the trial court's

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[5] The third affirmative defense was based on the established business relationship exception.

reliance on the mileage limitations in Code of Civil Procedure section 2025.250[6] was erroneous because the business records subpoena was served under Code of Civil Procedure sections 2020.020, subdivision (b) and 2020.410 and did not require the appearance of a witness.

Even assuming plaintiff is correct, and the mileage limitations in Code of Civil Procedure section 2025.250 did not apply to her business records subpoena to nonparty Global Crossing, she has not demonstrated prejudice from such legal error. Before an appellate court can reverse a trial court ruling, the appellant must demonstrate that the error upon which he or she relies was prejudicial.

"Our state Constitution provides that '[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) 'The effect of this provision is to eliminate any presumption of injury from error, and to require that the appellate court examine the evidence to determine whether the error did in fact prejudice the defendant. Thus, reversible error is a relative concept, and whether a slight or gross error is ground for reversal depends on the circumstances in each case.' (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 1, p. 443.) [¶] The phrase 'miscarriage of justice' has a settled meaning in our law, having been explained in the seminal case of *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243] (*Watson*). Thus, 'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have

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6 Code of Civil Procedure section 2025.250, subdivision (b) provides: "The deposition of an organization that is *a party to the action* shall be taken at a place that is, at the option of the party giving notice of the deposition, either within 75 miles of the organization's principal executive or business office in California, or within the county where the action is pending and within 150 miles of that office." (Italics added.) Because Global Crossing was not "a party to the action," this subdivision would not appear to apply to such a nonparty.

been reached in the absence of the error.' (*Id.* at p. 836.) 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [34 Cal.Rptr. 2d 898, 882 P.2d 894].)" (*Cassim v. Allstate Ins. Co., supra,* 33 Cal.4th at p. 800.)

Ordinarily, the appellant has the burden of affirmatively demonstrating prejudicial error. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) As one commentator has observed: "The 'prejudicial error' rule effectively imposes a *dual burden* on appellants: They must first prove *error*, and then show that the error was prejudicial. The burden of demonstrating prejudice is particularly onerous in civil appeals because many (if not most) trial court errors are found to be 'harmless.'" (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:291, p. 8-182.)

Plaintiff has failed to demonstrate that any legal error in the trial court's denial of her motion to compel compliance with the Global Crossing business records subpoena resulted in a "miscarriage of justice." First, even if plaintiff would have obtained documents from Global Crossing that were relevant to the class members' identities, those documents would not have cured the community of interest problem identified by the trial court. At best, plaintiff would have obtained the telephone numbers to which the Good Morning America announcement was transmitted. Such documents would not, however, have shown whether the person assigned to a given number actually received the announcement. As discussed above, that information could have only been obtained from the class members themselves, i.e., on a class member-by-class member basis. Nor would the documents from Global Crossing have addressed the consent and established business relationship issues. Whether a given class member consented to the transmission of the Good Morning America announcement or had an existing business relationship with the Eye Institute and Dr. Assil are issues that could only have been resolved on an individual basis. Thus, regardless of whether the subpoenaed documents had been obtained from Global Crossing and potential class members could have been identified, there was substantial evidence supporting the conclusion that basic issues of

liability would still need to be litigated individually and would predominate over the issues that could have been litigated on a classwide basis. As a result, plaintiff cannot demonstrate that there is a reasonable probability that she would have obtained a more favorable result on her class certification motion.

Second, there is no evidence in the record demonstrating that, had the trial court granted the motion, any relevant information would have been obtained from Global Crossing. In the declaration supporting the Global Crossing business records subpoena, plaintiff's counsel, based solely on "information and belief," concluded that "VisionLab used deponent Global Crossing . . . to transmit its facsimile advertisements (Fax Blasts) to Southern California telephone numbers and locations . . . ." But neither that declaration nor the motion itself provide any evidentiary foundation for that conclusion. For example, even though plaintiff took the deposition of VisionLab's CEO, there is no testimony in the record from him or anyone else linking Global Crossing to the broadcast transmission of the Good Morning America announcement. Absent some admissible evidence supporting the conclusion of plaintiff's counsel, it is speculative to contend that relevant identifying information about class members would have been obtained if plaintiff's motion for compliance had been granted. To show the requisite prejudice, plaintiff has the burden of pointing to some evidence in the record that relevant documents necessary to her class certification motion would likely have been obtained from Global Crossing and that such documents raised a reasonable probability that she would have received a more favorable result on her class certification motion. Her failure to do so renders the alleged legal error upon which she relies harmless.

E. Plaintiff's Other Contentions

Because we have concluded that the trial court applied the correct legal criteria and did not abuse its discretion in determining that common issues did not predominate, we do not reach plaintiff's other contentions concerning the denial of her class certification motion, including her arguments about ascertainability. As discussed above, even if the trial court erred as to those separate class certification issues, its ruling must

nevertheless be affirmed based on the court's finding that common issues did not predominate.

Plaintiff's arguments based on "suppression of evidence" lack factual and procedural support. As to the Eye Institute and Dr. Assil, there is no suggestion in the record that either suppressed or destroyed records relevant to identifying the persons or entities to whom the Good Morning America announcement was transmitted. To the contrary, the evidence shows that Dr. Assil and the Eye Institute did not receive the list of facsimile numbers used for the "fax blast." Instead, that list was transmitted directly from Interactive to VisionLab. Therefore, plaintiff's contention that the Eye Institute and Dr. Assil should nevertheless be punished for conduct in which they did not participate is doubtful. Agency principles have no bearing in this case on sanctions for discovery abuse. The trial court did not abuse its discretion in not subjecting the Eye Institute or Dr. Assil to sanctions for discovery abuse by another party not under their control in connection with the discovery. (See Code Civ. Proc., § 2023.010.)

In addition, even as to defendants Interactive, VisionLab,[7] and Giordano, there is no evidence that any of them actively suppressed or destroyed evidence. Although the VisionLab representative responsible for winding down its affairs testified that he searched for, but was unable to locate, documents showing the telephone numbers to which the facsimile broadcast was transmitted, he did not confirm if or when such documents had been destroyed, much less that they had been intentionally destroyed after notice of the trial court's document preservation order.

Moreover, if evidence of such intentional document destruction did exist, plaintiff failed to make a motion for issue or evidentiary sanctions as to any defendant based on that evidence. Absent such a motion, there was no basis for the trial court to exclude evidence or determine issues against any defendant. Although plaintiff now contends that her class certification motion should be construed as the equivalent of a motion for evidentiary or issue sanctions, there is no support in the record for such a conclusion.

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[7] As noted, Interactive has been dismissed and VisionLab is in default.

Plaintiff did not make that contention in the trial court and the record on the class certification motion contradicts any such strained construction of her motion. If plaintiff had admissible evidence that one or more of the defendants had engaged in discovery abuses by, for example, destroying records showing the class members' identities in violation of the trial court's document preservation order, it was incumbent upon her to present that evidence to the trial court in a properly noticed motion for issue, evidentiary, or terminating sanctions. Her failure to do so prevents her now from complaining on appeal about the unavailability of evidence that would have allegedly supported her class certification motion.

DISPOSITION

The trial court's orders denying plaintiff's class certification motion and motion to compel compliance with the business records subpoena are affirmed.[8] The Eye Institute and Dr. Assil are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

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[8] Appellant's Motion for Judicial Notice filed on April 3, 2008 is denied.